RECENT CASES.

BANKRUPTCY — DISTRICT COURT — JURISDICTION. — A bill in equity was filed in the United States District Court by a trustee in bankruptcy to have a fraudulent conveyance by the bankrupt set aside. *Held*, that the court cannot entertain jurisdiction except by consent of the defendant. *Bardes* v. *First Nat. Bank*, 20 Sup. Ct. Rep. 1000.

This decision settles a point about which there has been much doubt. By the Bankrupt Act of 1867, trustees in bankruptcy were expressly authorized to sue in the United States courts. Such a provision was omitted in the present act, and, instead, the trustee was authorized to bring suits without the consent of the defendant only in courts where the bankrupt might have brought them had there been no bankruptcy proceedings instituted. Act of 1898, § 23, b. A majority of the lower courts have interpreted this as not applying to a case like the present. *In re Baudouine*, 96 Fed. Rep. 536; *In re Hammond*, 98 Fed. Rep. 845. This construction has also been taken by the recent text-writers. LOWELL, BANKR. § 486; LOVELAND, BANKR. § 20. A variety of reasons has been given for the position, but all appear very technical and unconvincing. See *Mitchell* v. *McClure*, 91 Fed. Rep. 621. The real reason seems to be that the act as passed is unquestionably made less effective by this limitation on the power of the national courts, and this has led to an effort to evade the clear intent of the legislature. Under the act as it stands, however, the principal case is clearly right, the difficulty being one for the legislature to correct. The explanation of the clause is apparently found in the somewhat widespread jealousy of national jurisdiction over bankruptcy proceedings.

BILLS AND NOTES — FRAUD — RIGHTS OF DEFRAUDED TRANSFERER AGAINST INNOCENT MAKER. — The defendant gave to P several notes on the express agreement that he would not negotiate them. P wrongfully sold the notes to the plaintiff, a *bona fide* purchaser. The defendant, later, paid P the value of the notes to discharge them, but failed to demand their return. Subsequently P by fraud induced the plaintiff to give back the notes, and forwarded them to the defendant. *Held*, that the plaintiff can recover the value of the notes, the defendant not being a purchaser for value before maturity, and standing, therefore, in P's place. *Nash* v. *De Freville*, [1900] 2 Q. B. D. 72. See NOTES.

CARRIERS — ADMIRALTY — LIMITATION OF LIABILITY ON GRATUITOUS PASS. — A common carrier by sea issued a gratuitous pass containing a condition that the company be absolved from liability for negligence. *Held*, that the limitation bars recovery for goods lost by the carrier's negligence. *The Stella*, [1900] P. D. 161. See NOTES, 14 HARV. LAW REV. 147.

CARRIERS — DISCRIMINATION — REASONABLE REGULATIONS. — The defendant refused to haul relator's special cars and to distribute its poles, etc., between stations as its construction work required, although like services had been performed for a rival telegraph line. *Held*, that a mandamus should be issued to compel such services. *State ex rel. Cumberland Tel., etc. Co.* v. *Texas & P. R. R. Co.*, 28 So. Rep. 284 (La.).

The principal case, although going a little further than cases hitherto have gone, is perfectly sound. If rested on the ground given by the court, that discrimination between different members of the public by a common carrier is illegal, it would probably be followed in many jurisdictions. *Messenger* v. *Pennsylvania R. R. Co.*, 37 N. J. L. 531. *Contra*, *Fitchburg R. R. Co.* v. *Gage*, 78 Mass. 393. But independent of the question of discrimination, the principal case may well be supported on another and more satisfactory ground. The right of a railroad to insist on stopping at stations only, instead of at any desired point along the road, depends on the reasonableness of the regulation establishing the stations. A regulation, for instance, which would result in carrying bulky articles such as coal, live stock, etc., to a general delivery depot, when the consignee has facilities for receiving them alongside the track, would, considering the way business is done, be regarded as unreasonable. *Coe* v. *Louisville, etc. R. R. Co.*, 3 Fed. Rep. 775. Similarly, in the principal case, considering the manner in which telegraph lines are usually constructed, it was unreasonable for defendant to refuse plaintiff's demand.

CONSTITUTIONAL LAW — DOUBLE JEOPARDY — DISCHARGE OF JURY ON FAILURE TO AGREE. — *Held*, that the discharge of a jury because of its inability to reach a verdict is not a bar to a second trial under a constitutional provision that no person shall be twice put in jeopardy for the same offence. *People ex rel. Dreyer* v. *Magerstadt*, 20 Nat. Corp. Rep. 266 (Cir. Ct., Cook Co., Ill.). See NOTES, 14 HARV. LAW REV. 151.

CONSTITUTIONAL LAW — FOURTEENTH AMENDMENT — OFFICES. — *Held*, that the office of governor of a state is not property within the Fourteenth Amendment. *Taylor* v. *Beckham*, 20 Sup. Ct. Rep. 890. See NOTES.

CONSTITUTIONAL LAW — POLICE POWER — FOURTEENTH AMENDMENT. — A county ordinance prohibited the use of any repeating shotgun in hunting wild fowl. *Held*, that the ordinance is unconstitutional as interfering with the right of property in such a gun. *In re Marshall*, 102 Fed. Rep. 323 (Cir. Ct., Cal.).

The precise limits of the police power of the states are very uncertain, but it is well settled that game laws are properly within its scope. *Lawton* v. *Steele*, 152 U. S. 138; *People* v. *Bridges*, 142 Ill. 30. In the present case, however, the court grants that game laws in general are constitutional, but holds that this particular ordinance unreasonably discriminates against a particular class of guns, and is therefore bad. The better view clearly is that if the legislation in question in any way tends toward the desired end, the courts should not interfere. *State* v. *Mrozniski*, 59 Minn. 465. The legislature should be allowed to judge of the reasonableness of the particular means employed. *Phelps* v. *Racey*, 60 N. Y. 10. The court in the principal case seems not to have given due weight to this discretionary power.

CONSTITUTIONAL LAW — POLICE POWER — MILEAGE BOOK LAWS. — A New York statute enacted that all railroad companies within the state should sell one thousand mile tickets at a certain price. *Held*, that the statute is void, since it is not within the police power of the State. *Beardsley* v. *Erie R. R. Co.*, 56 N. E. Rep. 488 (N. Y.). See NOTES, 14 HARV. LAW REV. 143.

CONSTITUTIONAL LAW — VESTED RIGHTS — MECHANIC'S LIEN. — The plaintiff furnished materials to be used in the construction of the defendant's house. While suit was pending to enforce a mechanic's lien, the statute providing for such lien was repealed. *Held*, that the repealing law is valid and that the plaintiff's lien is destroyed. *Wilson* v. *Simon*, 45 Atl. Rep. 1022 (Md.).

That the constitutional provision against impairing the obligation of contracts does not interfere with legislation affecting remedies only is clear, since no one has a vested right to a particular remedy. *Commonwealth* v. *Hampden*, 23 Mass. 501; *The Collector* v. *Hubbard*, 12 Wall. 1, 14. The difficulty in cases like the present lies in determining whether the statute in question makes a legitimate alteration of a remedy, or whether it does not, in the form of changing a remedy, impair a vested right. On this question the courts have reached different conclusions. The principal case, in holding that a lien is merely an extraordinary form of remedy to which the plaintiff has no vested right and which the legislature may discontinue if it chooses, expresses what is probably the better opinion and is in accord with many of the authorities. *Bangor* v. *Goding*, 35 Me. 73; *Hanes* v. *Wadey*, 73 Mich. 178. *Contra*, *Warren* v. *Woodard*, 70 N. C. 382. Such statutes are very similar in general character to those abolishing imprisonment for debt, which are generally held to affect remedies only. *Penniman's Case*, 103 U. S. 714.

CONTRACTS — CONDITIONS — SATISFACTION OF PROMISOR. — In an action for breach of a contract reserving to the defendant the right to dismiss the plaintiff if his work was not satisfactory, there was evidence that the defendant was not, in fact, dissatisfied. *Held*, on motion by the defendant, that the case should not be left to the jury. *Crawford* v. *Mail, etc. Pub. Co.*, 57 N. E. Rep. 616 (N. Y.).

The court decide the case on the ground that in such contracts, where the subject-matter involves personal taste and judgment, the reasonableness of the satisfaction is immaterial. This is unquestionably good law. See 12 HARV. LAW REV. 496. But its application to these facts appears erroneous. While the defendant need not show that his dissatisfaction was reasonable, it is clearly within the terms of the contract that he be, in fact, dissatisfied. He should not be allowed to dismiss the plaintiff without cause, and then set up a fictitious plea of dissatisfaction. Since the plaintiff

offered evidence tending to show that this was the case, the lower court was clearly right in refusing to dismiss the suit, and leaving the question to the jury. *Daggett* v. *Johnson*, 49 Vt. 345.

CONTRACTS — STATUTE OF LIMITATIONS — NEW PROMISE. — *Held*, that a new promise, made after a cause of action is barred by the Statute of Limitations, does not revive the former obligation, but creates a new one on which the suit should be brought. *Ireland* v. *Mackintosh*, 61 Pac. Rep. 901 (Utah).

This decision holds that the statute destroys the legal obligation of the contract when it takes away the means of enforcing it, so that no subsequent action can revive the original right. The new promise is regarded as forming a new contract, on which action should be brought, the consideration being the moral duty to pay the outlawed debt. This doctrine of moral consideration has been almost universally discarded, although it was originally the ground of all the decisions on the point. *Irving* v. *Veitch*, 3 M. & W. 90, 105. The better view is that the statute merely gives a defence, and that the action should be brought on the original debt, the new promise to be replied as a waiver to the statutory bar, if that is pleaded. *Ilsley* v. *Jewett*, 44 Mass. 439; *Betton* v. *Cutts*, 11 N. H. 170. This rule is preferable in that it dispenses with an obsolete theory and is based on the real nature of the transaction. The anomalous rule that the action may be brought on either promise is entirely unsupportable. *Dusenbury* v. *Hoyt*, 53 N. Y. 521.

CORPORATIONS — ESSENTIAL ATTRIBUTES. — A Pennsylvania statute authorized the formation of partnership associations with limited liability, power to sue and be sued, and to acquire, hold, and convey real estate, in their associate names. It was provided also that the stock in these associations should be transferable, but only under such rules and limitations as their members should adopt. *Held*, that the plaintiff company, which was organized under this statute, is not a corporation. *Great Southern Fireproof Hotel Co.* v. *Jones*, 177 U. S. 449. See NOTES.

CORPORATIONS — PUBLIC HOSPITALS — LIABILITY TO PATIENTS. — The plaintiff, a patient in a public hospital chartered as a charitable corporation, was injured by the negligence of one of its nurses. *Held*, that he cannot recover from the hospital, even though he paid a pecuniary consideration for his treatment. *Powers* v. *Massachusetts Homœopathic Hospital*, 101 Fed. Rep. 896 (Cir. Ct., Mass.).

In cases where no compensation has been paid by the plaintiff, this result has been reached on the ground that the funds of the hospital cannot be appropriated to pay for such damages. *McDonald* v. *Mass. Gen. Hospital*, 120 Mass. 432. But here the court goes one step further, holding that the fact of payment of compensation to the hospital does not create a liability. They do not agree with the reasoning suggested above, but place their decision upon the ground that the plaintiff, having accepted the bounty of a charitable corporation, cannot complain of the way in which it is administered. Neither mode of reasoning seems adequate to support this rather anomalous doctrine, and several jurisdictions have rejected it altogether, and allow the patient an action. *Glavin* v. *Rhode Island Hospital*, 12 R. I. 411; 9 HARV. LAW REV. 541. This view seems preferable as tending to encourage strict care on the part of hospitals toward their patients, and as being in accord with the *respondeat superior* doctrine of agency, to which there seems no reason for making an exception here.

CRIMINAL LAW — DOUBLE JEOPARDY — CONVICTION ON SELF-ACCUSATION. — *Held*, that a conviction for assault before a justice of the peace upon the convicted person's self-accusation is no bar to a subsequent prosecution by the assaulted party. *Jebord* v. *People*, 61 Pac. Rep. 599 (Colo.). See NOTES.

CRIMINAL LAW — GENERAL VERDICT — VALIDITY OF SENTENCE. — A general verdict was entered on an indictment containing several counts. After sentence some of the counts were found bad. *Held*, that since the sentence was no heavier than might properly have been imposed on the good counts, it must be sustained. *Haynes* v. *United States*, 101 Fed. Rep. 817 (C. C. A., Eighth Cir.).

This case is directly opposed to a decision of the House of Lords. *O'Connell* v. *The Queen*, 11 Cl. & Fin. 155, 294, 350. It is in accord, however, with the American cases generally. *Evans* v. *United States*, 153 U. S. 608. *Hazen* v. *Commonwealth*, 23 Pa. St. 355, 366. Under the American rule, when enough good counts are shown to sustain the sentence, the other counts need not even be examined, for the sentence

is proved legal. *State* v. *Davidson*, 12 Vt. 300, 303. Moreover, this rule is not unfair to the prisoner, for in fixing the sentence the judge may always consider facts outside the case. *Brightwell* v. *State*, 41 Ga. 482. Furthermore, if later the judge thinks the punishment too severe, the executive will invariably grant a pardon on his recommendation. Accordingly, since the result under the English rule is to let the prisoner off entirely, the American cases are clearly preferable.

EVIDENCE — HEARSAY — PROBABLE CAUSE. — *Held*, that on the question of probable cause in an action for malicious prosecution, the defendant should not be allowed to testify that, previous to making the charge, he had been told that plaintiff was a dishonest man and had been in trouble before. *Hart* v. *McLaughlin*, 64 N. Y. Supp. 827 (Sup. Ct., App. Div., First Dept.).

The decision in the present case can hardly be supported on principle. It is clear that the evidence is not objectionable as hearsay, since it is offered not as proof of the facts stated, but as proof of the knowledge with which the defendant acted in making the charge *Bacon* v. *Towne*, 58 Mass. 217. Then, as the court admits, there is clear authority in favor of allowing evidence of the plaintiff's general reputation in the community on the question of probable cause. *Rodriguez* v. *Tadmire*, 2 Esp. 721; *Martin* v. *Hardesty*, 27 Ala. 458. But a reasonably prudent man would be no less justified in acting on information as to the plaintiff's character, communicated by one who knows the plaintiff, than on his general reputation. Accordingly, the rejection of the evidence offered here seems based on an unjustifiable distinction. The error probably arises from a misapplication of the established rule limiting character evidence in criminal cases to the defendant's general reputation. *Regina* v. *Rowton*, L. & C. 520.

EVIDENCE — PAROL EVIDENCE — LATENT AMBIGUITY. — *Held*, that a deed made to John Elliott and Amanda Elliott, his wife, as grantees, may be shown by parol evidence to have been made to a woman called by that name to whom John Elliott was unlawfully married, although he had a lawful wife living, also named Amanda Elliott. *Wolff* v. *Elliott*, 57 S. W. Rep. 1111 (Ark.).

There is a theory of construction that when the extrinsic facts have been looked into far enough to find a person who is accurately described, construction must stop, and no further evidence is admissible. *Stringer* v. *Gardiner*, 4 De G. & J. 468. The sounder view seems to be that in this class of cases, the court may look at all the facts in order to determine the grantor's meaning. *Grant* v. *Grant*, L. R. 5 C. P. 727; *Patch* v. *White*, 117 U. S. 210. This view is applied in the principal case. It is, however, an established exception, that a devise or bequest to *children*, or *issue*, imports only legitimate children, if there be such; and the words of the will being distinct, no extrinsic evidence can be received to show a different intention. *Cartwright* v. *Vawdry*, 5 Ves. 530; *Ellis* v. *Houstoun*, 10 Ch. D. 236. On principle, it would seem that the word *wife* should be given a similar technical construction, in which event the principal case is erroneous, the proper course being reformation of the deed.

EVIDENCE — PAROL EVIDENCE — VARYING CONTRACT. — The defendant made an oral contract with the plaintiff's agent. He also signed a different written agreement containing a stipulation that no oral conditions would be recognized. *Held*, that parol evidence is admissible to show that the defendant signed the contract with the understanding that it was not to be binding but was to be used for advertising purposes only. *Street Ry. Adv. Co.* v. *Shoe Mfg. Co.*, 46 Atl. Rep. 513 (Md.).

This decision is clearly correct. The so-called parol evidence rule as applied to this case simply means that, since by the law of contracts a written agreement, intended to be complete, must be enforced according to its terms, no evidence can be received to vary those terms, for it would be irrelevant. THAYER, PRELIM. TREAT. EV. 396, 397. But it is always permissible to attack the existence of a contract, and thus parol evidence should always be received to show that a given writing was never made or intended as a contract. *Raffles* v. *Wichelhaus*, 2 H. & C. 906; *Adams* v. *Morgan*, 150 Mass. 143. That was all which was attempted in the principal case. This distinction, however, has not always been recognized and consequently some unjustifiable decisions at variance with the principal case are to be found. *Beard* v. *Boylan*, 59 Conn. 181.

EVIDENCE — RES GESTA — PROXIMITY OF TIME. — A person since deceased met with an accident in a basement, and on coming upstairs ten or fifteen minutes later

made statements as to the fact, nature, and extent of the injury. *Held*, that such declarations are so nearly connected with the occurrence as to be admissible as a part of the *res gesta*, to prove the cause of his death. *Travelers' Protective Association* v. *West*, 102 Fed. Rep. 226 (C. C. A., Seventh Circ.).

The true conception of the *res gesta* rule is, that a statement, bad as hearsay, may yet come in when part of a transaction which is itself receivable. *Waldele* v. *New York, etc. R. R. Co.*, 95 N. Y. 274. Thus, strictly, the declaration, to be received in evidence, must be made contemporaneously with, that is, immediately after the principal fact and in explanation of it. *Thompson* v. *Trevanion*, Skin. 402; *Chicago, etc. Ry. Co.* v. *Bicker*, 128 Ill. 545. But it has been held that, although generally the declarations must be contemporaneous, yet where there are connecting circumstances, they may, even when made some time afterwards, form a part of the whole *res gesta*. *Travelers' Ins. Co.* v. *Mosley*, 8 Wall. 397. This assumes that the matter of time is not important, and would reduce the whole question to one of circumstantial evidence. But from this point of view all hearsay might be good and the whole nature of the hearsay rule would be changed. The decision in the principal case, being in accord with this looser rule, is thus very questionable.

EVIDENCE — WILLS — POST-TESTAMENTARY DECLARATIONS. — The due execution of a lost will having been proved, and its possession by the testatrix, *held*, that her subsequent declarations as to the will, although made shortly after its supposed destruction, are inadmissible to rebut the presumption of revocation. *In re Kennedy's Will*, 65 N. Y. Supp. 879 (Sup. Ct., App. Div., First Dept.).

This decision is opposed to the great weight of authority in England and America. *Sugden* v. *St. Leonards*, L. R. 1 P. D. 154; *Pickens* v. *Davis*, 134 Mass. 252. It is settled that in the absence of other evidence the loss of a will raises a presumption of revocation. *Behrens* v. *Behrens*, 47 Ohio St. 323. But this presumption may be rebutted by showing a lack of intent to revoke. *In re Steinke's Will*, 95 Wis. 121. Moreover, the evidence here offered was competent to show such absence of intent, for the declarations of a person are admissible whenever it is relevant to show that person's state of mind at the time when the statements were made. *Mutual, etc. Ins. Co.* v. *Hillmon*, 145 U. S. 285. Furthermore, the state of mind of the testatrix in this case shortly after the supposed time of revocation is clearly probative of her intent at that time. On this ground the declarations should have been admitted, whatever weight they might subsequently have received.

PARTNERSHIP — NOTICE OF WITHDRAWAL — LIABILITY OF RETIRING PARTNER. — A, B, and C were in partnership under the name of A and B. The plaintiff made this firm an offer which resulted in a sale after C had withdrawn from the partnership. *Held*, that these facts do not constitute such dealing with the firm while C was a member as to entitle the plaintiff to special notice of his withdrawal. *Bowker Contracting Co.* v. *Scribner*, 65 N. Y. Supp. 444 (Sup. Ct., App. Div., First Dept.).

Whoever has dealt with a firm prior to its dissolution is entitled to special notice of the withdrawal of any partner, if that member is to be relieved from liability for subsequent transactions under the firm name. *Austin* v. *Holland*, 69 N. Y. 571; *Elkinton* v. *Booth*, 143 Mass. 479. The court in the principal case adopts the view that dealings mean such business relations as raise a credit upon the faith of the co-partnership. *Vernon* v. *Manhattan Co.*, 22 Wend. 190. Admitting the correctness of this definition, it is difficult to see why an offer to a firm before its dissolution which is accepted by the new firm using the old name is not such a dealing. The offer here was made to a firm of three members, and it does not alter the liability of the third member that the plaintiff was ignorant of his existence. *Elmira, etc. Mill Co.* v. *Harris*, 124 N. Y. 280. Thus a sale was made and credit given to the new firm upon the faith of the old and in consequence of the offer to the latter. This seems to fulfil the definition of dealings, and, if so, the decision here is wrong.

PERSONS — DIVORCE — JURISDICTION. — The plaintiff, who had been married in another state, later became domiciled in Louisiana, and sought a divorce there for causes antedating that domicile. *Held*, that the Louisiana courts have no jurisdiction. *Nicholas* v. *Maddox*, 27 So. Rep. 966 (La.).

It is held in the great majority of cases, that the place of domicile of the parties to divorce suits at the time when the offence was committed has no effect on the jurisdiction of the court. *Hubbell* v. *Hubbell*, 3 Wis. 662; *Tolen* v. *Tolen*, 2 Blackf. 407. The doctrine of the principal case is, however, not confined to Louisiana. *Norris* v.

Norris, 64 N. H. 523. There seems to be no reason on principle why the courts cannot take jurisdiction of such cases. Indeed, the question really before them is whether these parties are fit to live together in the state as married persons. The right of the court to determine such a question can in no way be affected by the facts shown, and the case is, therefore, unsound on principle.

PROPERTY — AMELIORATING WASTE. — Land demised by the plaintiff to the defendant for ninety-nine years was sublet by the defendant for a dump, and the height of the land was increased by the rubbish deposited. *Held*, that this alteration of the premises constitutes waste and that the defendant can be enjoined from continuing the user, even though the value of the premises would be increased thereby. *West Ham Charity Board* v. *East London Waterworks Co.*, [1900] 1 Ch. D. 624. See NOTES.

PROPERTY — BOUNDARIES — LAND BOUNDED BY AN INTENDED STREET. — The City of New York granted a lot of land bounded by a street designated on a map but never opened. *Held*, that since by statute the city must own the fee in all streets, it cannot have intended to grant out what it would later have to buy back; and that, therefore, the deed carries the land only to the side of the intended street, not to the centre. *Graham* v. *Atern*, 64 N. Y. Supp. 728 (Sup. Ct., App. Div., First Dept.). See NOTES.

PROPERTY — IMPLIED GRANT — QUASI-EASEMENTS. — The owner of two adjacent lots sold one of them to the plaintiff and later the other to the defendant. At the time of both conveyances an alley on the defendant's lot gave access, and admitted light and air to the rear of the plaintiff's house, and its presence was reasonably necessary to the beneficial enjoyment of the plaintiff's property. *Held*, that the defendant had no right to extend her house over the alley. *Irvine* v. *McCreary*, 56 S. W. Rep. 966 (Ky.).

It seems settled in England and in many of our states that where the owner of two parcels of land has subjected one of them to quasi-easements for the benefit of the other, the easements will pass by implication to the grantee of the latter parcel, if they are apparent and continuous, and reasonably necessary to the beneficial enjoyment of the parcel conveyed. *Watts* v. *Kelson*, L. R. 6 Ch. D. 166; *Lampman* v. *Milks*, 21 N. Y. 505. Authority is divided as to the classification of ways, but the question of light and air clearly brings the principal case within this rule. In a few states, however, the courts limit the doctrine of implied grant to cases of strict necessity, refusing to read into a deed what is neither expressed nor necessarily implied. *Buss* v. *Dyer*, 125 Mass. 287. The broader rule is not easy to defend on technical grounds, and the cases which support it give no satisfactory reasons beyond the obvious desirability of the result. This, however, with the weight of authority amply justifies the decision in the principal case.

PROPERTY — NAVIGABLE RIVERS — TITLE TO ISLANDS. — An island formed in the Missouri River opposite plaintiff's land, separated from it by a narrow slough. *Held*, that the plaintiff has no title to the island, since the state, and not the riparian proprietor, owns the beds of rivers navigable in fact. *Moore* v. *Farmer*, 56 S. W. Rep. 493 (Mo.).

The common law rule is that river-beds belong to the state only where the tide ebbs and flows. *Pearce* v. *Scotcher*, 9 Q. B. D. 162. Most of the western states, however, are in accord with the present case in making public ownership of river-beds depend upon the fact of navigability. *McManus* v. *Carmichael*, 3 Iowa, 1. In England practically all navigable rivers are subject to tidal changes, and, moreover, the English courts appear to hold that river-beds do not belong to the crown, even though the tide ebbs and flows, if in fact the rivers are not navigable. *Mayor of Lynn* v. *Turner*, Cowp. 86 (*semble*). Hence, the application of the common law rule in England is practically identical with the result reached in the main case. Accordingly, just as the greater length and importance of our rivers has resulted in the extension of admiralty jurisdiction in this country to all navigable rivers, *Genesee Chief*, 12 How. 443, these same conditions equally justify the adoption by the western states of the spirit rather than the form of the common law on this point. *Packer* v. *Bird*, 137 U. S. 661. Thus the principal case is to be supported. The states where rivers are of little importance, however, generally adhere strictly to the common law rule. *Butler* v. *Grand Rapids, etc. R. R. Co.*, 85 Mich. 246.

PROPERTY — RIPARIAN RIGHTS — RESTORING STREAM TO ORIGINAL CHANNEL. — The plaintiff and defendant were riparian owners on opposite sides of a river which had been gradually encroaching on the latter's land. *Held*, that the defendant has a right to restore the stream to its original channel, although as a result the plaintiff suffers. *Gulf, etc. R. R. Co.* v. *Clark*, 101 Fed. Rep. 678 (C. C. A., Eighth Cir.).

It is admitted, in general, that a riparian owner may change the channel of a river to protect his land, only so far as he does not injure others. *King* v. *Trafford*, 1 B. & Ad. 874, 887; *Barnes* v. *Marshall*, 68 Cal. 569. The court attempts to distinguish the principal case, on the ground that restoring the water to its original bed was not changing its natural channel. But it seems that on principle this distinction is untenable. The wrong to the plaintiff remains the same in either case. He owned the land of which he was deprived by the defendant's act. The fact that the river had encroached on the defendant's land can have no effect on the plaintiff's right to his property. What little authority there is on the point takes this view. *Gerrish* v. *Clough*, 48 N. H. 9 (*semble*).

PROPERTY — WARRANTY DEED — AFTER-ACQUIRED TITLE. — A conveyed land to B with a covenant of warranty, and also with a covenant against all incumbrances except a certain mortgage, which A afterwards acquired and conveyed to C. *Held*, that this after-acquired title passed to B and not to C. *Rooney* v. *Koenig*, 83 N. W. Rep. 389 (Minn.).

This case is in accord with the doctrine generally followed in the United States, that an estoppel which affects an after-acquired title depends solely on the technical effect of the covenant of warranty. *Ayer* v. *Philadelphia, etc. Co.*, 159 Mass. 84; *Sandwich Mfg. Co.* v. *Zellmer*, 48 Minn. 408. On principle, however, the doctrine seems incorrect, for an estoppel is generally founded on a misrepresentation, and this cannot exist where the outstanding mortgage is mentioned in the deed, even though there be a covenant of warranty, for the truth appears on the face of the deed. *Temple* v. *Partridge*, 42 Me. 56. The most that can be found here is a promise to protect the grantee against the mortgage. Indeed, where the land is stated to be conveyed subject to a mortgage the doctrine of the principal case is not applied. *Merritt* v. *Rogers*, 46 Minn. 74. The main argument in favor of the decision is that it establishes a uniform rule that any superior outstanding title subsequently acquired by the grantor will inure to the benefit of the grantee, whenever land is conveyed with a covenant of warranty.

TORTS — ASSUMPTION OF DUTY — TERMINATION OF CUSTOM. — X contracted with a railroad company to load and move cars in an elevator. It had been the company's custom for years to set the brakes on certain cars when placed upon an incline. The plaintiff, who was employed by X, had relied upon such custom, and was injured because of its unexpected discontinuance. *Held*, that there is no liability, as the company was under no duty to set the brakes in question. *O'Leary* v. *Erie R. R. Co.*, 64 N. Y. Supp. 511 (Sup. Ct., App. Div., Fourth Dept.).

The court argued that since the defendant was under no contractual obligation to set the brakes, the practice could be discontinued at any time without notice. It has been held that a railway company, having stationed a watchman at a point where there was no duty to maintain one, did not incur an obligation to continue one there. *Cliff* v. *Midland Ry. Co.*, L. R. 5 Q. B. 258. It does not follow that the company may lure men into danger by ceasing the practice without notice. *Burns* v. *North Chicago Rolling Mill Co.*, 65 Wis. 312, 315. The relief sought here is not compulsory continuance of this practice. Admittedly it could have been discontinued after notice. The plaintiff merely asks damages for injuries resulting from defendant's failure to perform a duty which it had assumed. An earlier case held that, although signals at private crossings were optional, yet if the company is notoriously accustomed to give such signals, travellers have a right to rely upon the company's doing so. *Nash* v. *New York, etc. R. R. Co.*, 15 N. Y. St. Rep. 879. The principal case seems directly contrary and not to be supported.

TORTS — CONVERSION BY CARRIER — UNAUTHORIZED SHIPMENT. — A railroad company, employed to transport plaintiff's goods to Galveston as their destination, delivered them by mistake to defendant steamship company in Galveston for export to New York. *Held*, that in carrying the goods to New York the defendant company became liable for conversion, however innocently it acted. *Liefert* v. *Galveston etc. Ry. Co.*, 57 S. W. Rep. 899 (Tex., Civ. App.).

No authority has been found for this decision, and, indeed, the contrary seems well established. *Greenway* v. *Fisher*, 1 C. & P. 190; *Gurley* v. *Armstead*, 148 Mass. 267. The carrier has been excused even when he continued the transportation after notice of the claim of the true owner. *Metcalf* v. *McLaughlin*, 122 Mass. 84. The court in the present case is perhaps misled by similar cases in which the carrier has been denied a lien for his charges, though it is clear that this question would not have been considered had the transportation itself been treated as a conversion. *Robinson* v. *Baker*, 59 Mass. 137. The general principle which should cover all these cases is that one who deals with possession only, without claiming any right or property in himself, or in any way dealing with title, is not liable to the true owner, provided he acts in good faith under the apparently rightful authority of one in possession of the goods. *Hollins* v. *Fowler*, L. R. 7 H. L. 757, 766. Thus the main case seems unsupportable.

TORTS — LOOK AND LISTEN RULE — STREET RAILWAY. — The plaintiff, while driving at night upon a road in the outskirts of a city, was struck by the car of an electric street railway company. *Held*, that his failure to look for an approaching car is contributory negligence, as a matter of law. *Wosika* v. *St. Paul City Ry. Co.*, 83 N. E. Rep. 836 (Minn.).

The fact that a failure to look and listen when crossing a steam railroad track is so uniformly held by juries to constitute contributory negligence, has led in many jurisdictions to its crystallization into a rule of law to be applied by the court without the aid of the jury. *Reading, etc. R. R. Co.* v. *Ritchie*, 102 Pa. St. 425. On principle, of course, this is indefensible, and the question of contributory negligence should always be left to the jury. *Terre Haute, etc. R. R. Co.* v. *Voulkes*, 129 Ill. 540, 551. But granting the arbitrary rule as regards steam railroads, its application to street railways even in suburban districts appears to be a dangerous precedent. The court limits the scope of its decision to such railways, and argues that the public convenience requires that in sparsely populated districts street cars should have a right of way approaching in its exclusiveness the right of steam roads. But the danger to the public from such a use of the highways is so great, that it seems the courts should be very cautious in making decisions which may lead to a lessening of care on the part of the railways.

TORTS — MALICIOUS INTERFERENCE WITH BUSINESS. — The defendants, members of a labor union, conspired to compel the members of a rival union to join their organization, by securing the discharge of the latter from employment through intimidations and threats of strikes. *Held*, that an injunction will lie to restrain them from so doing. *Plant* v. *Woods*, 57 N. E. Rep. 1011 (Mass.). See NOTES.

TORTS — MALICIOUS PROSECUTION — PROBABLE CAUSE. — *Held*, that the question of probable cause in malicious prosecution is for the jury. *Kehl* v. *Hope, etc. Co.*, 27 So. Rep. 641 (Miss.).

It has long been established in Mississippi as well as elsewhere, in cases of malicious prosecution and false imprisonment, that the jury must find the facts, if disputed, and the court must decide whether they show probable cause. *McNulty* v. *Walker*, 64 Miss. 198; *Panton* v. *Williams*, 2 Q. B. 169. But the House of Lords, while recognizing this rule as law, has expressed the opinion that it ought never to have become so. *Lister* v. *Perryman*, L. R. 4 H. L. 521. Since that opinion was announced several English judges have so framed the questions of fact for the jury as practically to leave the whole matter in their hands. *Abrath* v. *North Eastern Ry. Co.*, 11 App. Cas. 247. The same disposition has been apparent in this country. *Johnson* v. *Miller*, 69 Iowa, 562. On principle there is no sufficient reason why the question of probable cause should not be classed with those of reasonable care and fair comment, which are undoubtedly proper questions for the jury. Moreover, the law may ultimately adopt this position, but it hardly seems probable that the court in the principal case intended, without further consideration, to make so radical a departure.

TORTS — MALICIOUS PROSECUTION — TERMINATION OF SUIT. — The plaintiff was arrested on a warrant but was discharged by the preliminary magistrate before any evidence was introduced. *Held*, that this is not a sufficient termination of the prosecution in the plaintiff's favor to support an action for malicious prosecution. *Ward* v. *Reasor*, 36 S. E. Rep. 470 (Va.). See NOTES.

TORTS — SLANDER — PUBLICATION INDUCED BY THE PLAINTIFF. — The defendant privately charged the plaintiff with theft. The latter insisted that the defendant must prove his accusation and had him repeat it to a policeman. *Held*, that he thereby consented to the repetition, and that it is therefore not actionable. *Shinglemeyer* v. *Wright*, 82 N. W. Rep. 887 (Mich.). See NOTES.

TRUSTS — CONSTRUCTIVE TRUSTS — MINGLING MONEY. — The plaintiff deposited money in a bank which was, to the knowledge of its officers, hopelessly insolvent. The bank mixed the money with other funds, and went into the hands of a receiver the next day. *Held*, that the plaintiff can recover the whole deposit. *Richardson* v. *New Orleans, etc. Co.*, 102 Fed. Rep. 780 (C. C. A., Fifth Cir.).

In allowing recovery in this case, the court goes on the ground that a trust attached to the money, although it had been mingled with other funds. Clearly this would have been true if the money had been kept separate. *Saint Louis, etc. Ry. Co.* v. *Johnston*, 133 U. S. 566. But such reasoning will hardly apply to the present facts, for it is impossible to find a *res*. Since, however, the bank stopped business almost immediately after the deposit was made, the other creditors cannot claim that it has led to transactions which may have prejudiced their interests. Moreover, unless this claim is allowed, the fund to be divided among them will be gratuitously increased at the expense of the defrauded depositor. Therefore, on quasi-contractual grounds to prevent this manifestly inequitable result, the depositor should be given the position of a preferred creditor. *Central Nat. Bank* v. *Connecticut, etc. Co.*, 104 U. S. 54; *Harrison* v. *Smith*, 83 Mo. 210. *Contra*, *Illinois, etc. Bank* v. *First Nat. Bank*, 15 Fed. Rep. 858.

TRUSTS — RESULTING TRUST — MISAPPROPRIATED FUNDS. — A guardian bought land, and paid part of the purchase price with her ward's funds. *Held*, that this creates no resulting trust in favor of the ward. *Myers* v. *Myers*, 35 S. E. Rep. 868 (W. Va.).

When a fiduciary buys land paying for it entirely with the funds of his beneficiary, it is universally held that there is a resulting trust in favor of the beneficiary. *Bancroft* v. *Cousen*, 95 Mass. 50. This is clearly correct, since the fund constitutes a *res* which can be followed into the land, and the fiduciary should not profit by his wrongful act, if the land increases in value. The same reasons require a trust to be imposed, as to a proportional share of the land, when the misappropriated funds form a part only of the purchase price. The principal case is, therefore, wrong on principle. It is moreover opposed to the weight of authority. *Bitzen* v. *Bobo*, 39 Minn. 18; *Watson* v. *Thompson*, 12 R. I. 466. *Contra*, *Bresinlian* v. *Sheehan*, 125 Mass. 11.

TRUSTS — RESULTING TRUST — UNEXPENDED BALANCE OF FUND RAISED BY SUBSCRIPTION. — Two ladies, beneficiaries of a fund raised by subscription, both died. *Held*, that there is a resulting trust of the unexpended balance of the fund to the subscribers in proportion to their several contributions. *In re the Trusts of the Abbot Fund*, [1900] 2 Ch. D. 326.

In an earlier case, the English courts held that where all the members of an association were dead, the unexpended balance of a fund raised by payments made by the several members went to the crown as *bona vacantia*. *Cunnack* v. *Edwards*, [1896] 2 Ch. D. 679. This decision, while the facts on which it is based are somewhat similar to those of the principal case, can be distinguished on the ground that by the rules of the association it was clear that each member parted finally with all his interest in the money subscribed. In the present case the fund was raised for a particular and temporary purpose only, and this purpose being completely performed, the manifestly equitable result is to divide the fund among the subscribers proportionately. *Easterbrooks* v. *Tillinghast*, 71 Mass. 17; *In re Printers', etc. Soc.*, [1899] 2 Ch. D. 184. The doctrine of *cy pres* is of course inapplicable, for the persons to be benefited by the gift were not indefinite. *Jackson* v. *Phillip*, 96 Mass. 539, 556.